A

STRONPAC CONSTRUCTION SDN BHD v. VAST CONSORTIUM SDN BHD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: N-02(NCVC)(W)-52-01-2017]
20 MARCH 2018

C ***CONTRACT:*** *Breach – Damages – Allegation that contractor failed to comply with construction plans – Discrepancy in length of houses built – Whether developer incurred losses – Whether project completed within stipulated time frame – Whether completed works certified and approved by architect – Whether contractor supplied with revised architectural drawings – Whether revised architectural drawings approved by local authority – Whether contractor constructed houses based on*
D *construction drawings*

The appellant ('defendant') was appointed by the respondent ('plaintiff') as the contractor to carry out three projects, to construct a total of 61 units of double storey terrace houses. Pursuant to the letter of award, the defendant was to carry out and complete the construction works in accordance to the
E drawings, including the engineer's structural construction drawings. It was the plaintiff's pleaded case that the defendant constructed the houses with a discrepancy of 2sqf in the living/saloon area and not as specified in the construction drawings, *ie*, the length of the living/saloon area should have been 40sqf and not 38sqf. The plaintiff thus contended that the defendant, in
F carrying out the construction works, had wilfully, negligently and/or recklessly breached the terms of the three contracts awarded. Due to the discrepancy, the plaintiff had to reduce the selling price of the houses from RM250,000 per unit to RM230,000 per unit and thus suffered a total loss of RM1,220,000. The defendant, on the other hand, contended that they had
G complied with all the instructions and drawings given to them and the architect appointed by the plaintiff had certified and approved the defendant's works. The defendant thus counterclaimed for the amount outstanding and the retention sum, the total of which was RM432,554.97. The issue raised in the High Court was whether the defendant had complied
H with the plaintiff's drawings specifying that the living room and/or saloon area must be 40sqf in length. The High Court Judge ('HCJ'), in allowing the plaintiff's claim, concluded that the defendant had failed to comply with the revised architectural drawings and as a result, the plaintiff suffered the losses. Hence, the appeal against the decision of the HCJ.

I

Held (allowing appeal with costs; allowing defendant's counterclaim)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) The defendant completed the project within the time stipulated in the contract. Although the alleged discrepancy was discovered by the plaintiff's director before the handover, the defect was only disclosed two years after the defective liability period. The discrepancy was only made known to the defendant after the defendant issued a notice of demand for the retention sum and outstanding sum due for infrastructure works. Throughout the construction period, there was no evidence of non-compliance or delay by the defendant. In fact, the architect appointed by the plaintiff certified and approved all the works that were completed by the defendant. (paras 17, 35 & 36)

(2) There was no clause in the contract documents specifically providing that the length of the houses to be built must be 40sqf. The defendant constructed the houses based on the construction drawings given to them where it was specified that the length of the houses to be built was 38sqf. In determining whether the defendant had breached the terms of the contract, the HCJ must take into consideration whether the revised architectural plan was approved by the Majlis Perbandaran Nilai ('MPN') and that the said approved revised architectural plan was given to the defendant to comply. However, there was no supporting evidence, oral or documentary, to prove that the two drawings were actually given to the defendant or approved by the MPN according to the requirement of the law. Therefore, the HCJ had fundamentally misdirected himself in concluding that the approved plans by MPN were only for the purposes of the issuance of the certificate of fitness. (paras 25-27 & 30)

Bahasa Malaysia *Headnotes*

Perayu ('defendan') dilantik responden ('plaintif') sebagai kontraktor untuk melaksanakan tiga projek, untuk membina sejumlah 61 unit rumah teres dua tingkat. Berikutan surat award, defendan sepatutnya menjalankan dan menyiapkan kerja-kerja pembinaan mengikut lukisan, termasuk lukisan struktur pembinaan oleh jurutera. Kes plaintif yang diplid adalah bahawa defendan telah membina rumah-rumah tersebut dengan perbezaan dua kaki persegi di kawasan ruang tamu dan bukan seperti yang dispesifikasi dalam lukisan pembinaan, iaitu panjang kawasan ruang tamu sepatutnya 40 kaki persegi dan bukan 38 kaki persegi. Plaintif, oleh itu, menghujahkan bahawa defendan, dalam melaksanakan kerja-kerja pembinaan, dengan sengaja, cuai dan/atau secara melulu melanggar terma-terma dalam ketiga-tiga kontrak yang diawardkan. Disebabkan perbezaan tersebut, plaintif terpaksa mengurangkan harga jualan rumah-rumah tersebut daripada RM250,000

seunit kepada RM230,000 seunit dan dengan itu mengalami kerugian sejumlah RM1,220,000. Sebaliknya, defendan menghujahkan bahawa mereka telah mematuhi kesemua arahan dan lukisan yang diberikan kepada mereka dan arkitek yang dilantik plaintif telah mengesahkan dan meluluskan kerja-kerja defendan. Defendan, oleh itu, menuntut balas jumlah tertunggak dan jumlah yang ditahan, keseluruhannya berjumlah RM432,554.97. Isu yang berbangkit di Mahkamah Tinggi adalah sama ada defendan mematuhi lukisan plaintif yang menyatakan bahawa panjang kawasan ruang tamu sepatutnya pada 40 kaki persegi. Hakim Mahkamah Tinggi ('HMT'), dalam membenarkan tuntutan plaintif, memutuskan bahawa defendan gagal mematuhi lukisan arkitek yang disemak dan akibatnya, plaintif mengalami kerugian. Dengan itu, rayuan terhadap keputusan HMT.

Diputuskan (membenarkan rayuan dengan kos; membenarkan tuntutan balas defendan)

Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Defendan menyelesaikan projek tersebut dalam tempoh masa yang dinyatakan dalam kontrak. Walaupun perbezaan yang dinyatakan didapati oleh pengarah plaintif sebelum penyerahan, kecacatan tersebut hanya didedahkan dua tahun selepas tempoh liabiliti cacat. Perbezaan tersebut hanya dimaklumkan pada defendan selepas defendan mengeluarkan notis tuntutan untuk jumlah yang ditahan dan jumlah tertunggak untuk kerja-kerja infrastruktur. Sepanjang tempoh pembinaan, tiada keterangan ketidakpatuhan atau kelewatan oleh defendan. Pada hakikatnya, arkitek dilantik plaintif mengesahkan dan meluluskan kesemua kerja yang diselesaikan defendan.

(2) Tiada klausa dalam dokumen kontrak yang secara khusus memperuntukkan bahawa panjang rumah-rumah yang perlu dibina sepatutnya 40 kaki persegi. Defendan membina rumah-rumah tersebut berdasarkan lukisan pembinaan yang diberi kepada mereka di mana ia menyatakan secara khusus bahawa panjang rumah yang akan dibina adalah 38 kaki persegi. Dalam memutuskan sama ada defendan melanggar terma-terma kontrak, HMT mesti mempertimbangkan sama ada plan arkitek yang disemak diluluskan oleh Majlis Perbandaran Nilai ('MPN') dan bahawa plan arkitek yang disemak diberikan kepada defendan untuk dipatuhi. Walau bagaimanapun, tiada keterangan sokongan, lisan atau dokumentar, untuk membuktikan bahawa kedua-dua lukisan tersebut sebenarnya diberikan kepada defendan atau diluluskan oleh MPN menurut keperluan undang-undang. Oleh itu, HMT tersalah arah, pada asasnya apabila memutuskan bahawa pelan yang diluluskan oleh MPN hanya untuk tujuan pengeluaran perakuan kelayakan.

Case(s) referred to:
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka [2014] 9 CLJ 1064 FC ***(refd)***

Legislation referred to:
Street, Drainage and Building Act 1974, s. 70
Uniform Building By-Laws 1984, r. 14

For the appellant - Justin Voon, KF Wong & Azmi Abdoll Aziz; M/s KF Wong & Lee
For the respondent - Jason Ng Kau, Khong Zhi Jian & Tan Keng Soon; M/s Jason Ng & Partners

[Editor's note: For the High Court judgment, please see Vast Consortium Sdn Bhd lwn. Stronpac Construction Sdn Bhd [2016] 1 LNS 1741 (overruled).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] The appeal before us was against the decision of the learned High Court Judge in Seremban High Court allowing the respondent's (the plaintiff in the High Court) claim. We had, after perusing the records of appeal and considering the written and oral submissions of learned counsel for the appellant and the respondent, unanimously allowed the appeal with costs of RM50,000 for here and below and we allowed the counterclaim with costs of RM10,000. We set aside the order of the High Court. We further ordered that the deposit be refunded. Our reasons appear below.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

Material Facts

[3] The defendant submitted a quotation dated 6 March 2010 to the plaintiff for the construction of 50 unit of houses based on architectural drawings and structural drawings provided by the plaintiff. Based on the quotation submitted, the plaintiff appointed the defendant as its contractor to carry out the project described as "Cadangan Mendirikan Projek Perumahan Yang Mengandungi 191 Unit Teres Dan 1 Unit Pencawang Elektrik TNB Di Atas Tanah Lot Asal 3327, G17838 Fasa 2, Rumah Teres 2 Tingkat, Blok 1 (Lot 180-187) & Blok 2 (Lot 202-207),14 Unit Di Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khusus ("the first contract") and Cadangan Mendirikan Projek Perumahan Yang Mengandungi 192 Unit Teres Dan 1 Unit Pencawang Elektrik TNB Di Atas Tanah Lot Asal 3327, G17838

Fasa 2, Rumah Teres 2 Tingkat, Blok 3 (Lot 188-195) & Blok 4 (Lot 196-201) & Blok 5 (Lot 2018-221) & Blok 6 (Lot 222-229), 36 Unit Di Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khusus ("the second contract").

[4] Subsequently, the plaintiff awarded the third contract to the defendant to construct an additional 11 units. In total under all the three contracts awarded by the plaintiff, the defendant was to construct a total of 61 units of double-storey terrace houses ('the project'). Pursuant to the letter of award the defendant was to carry out and complete the construction works in accordance to the drawings including the engineer's structural construction drawings prepared by Messer Jurutera Sinarunding Aidil Sdn Bhd.

[5] It is the plaintiff's pleaded case that the defendant constructed the houses with a discrepancy of 2sqf in the living/saloon area and not as specified in the construction drawings, that is the length of the living/saloon area should have been 40sqf instead of 38sqf. The plaintiff claimed that the defendant failed to carry out the construction works in accordance with the construction drawings prepared by the engineer which had expressly stipulated that the length of the living/saloon area is 40sqf. Therefore, it is contended by the plaintiff that the defendant in carrying out the construction works had wilfully, negligently and or recklessly breached the terms of the three contracts awarded.

[6] Due to the discrepancy and/or shortfall in the size of the living/the saloon area, the plaintiff was unable to sell the houses at its original price of RM250,000 per unit ("the original price"). In order to be able to sell the houses with the discrepancy, the plaintiff had to reduce the sale price of the houses to RM230,000 per unit ("the current price").

[7] The plaintiff contended that they suffered a total loss of RM1,220,000 for the 61 units of houses (RM20,000 × 61 units of houses). In the statement of claim, the plaintiff sought the following reliefs:

(i) a declaration that the defendant breached the three contracts;

(ii) an order that the defendant pays special damages in the sum of RM1,2000,000 for the breach of contract;

(iii) damages, general and/or aggravated and/or equitable to be assessed;

(iv) interest at such rate and for such period as the court deems fit;

(v) an order that the defendant pays the plaintiff such damages as assessed; and

(vi) costs.

[8] The defendant in its statement of defence denied that they had not complied with the construction's plans that were given to them. It is the defendant's pleaded case that they had complied with all the instructions and drawings given to them. The defendant was given the construction plans by the architect appointed by the plaintiff, Arkitek Saujana. The expected date of completion based on the letter of award was on or before 11 February 2011. The project was fully completed by the defendant and Arkitek Saujana had certified and approved the defendant's works. The plaintiff had admitted that the phase 2 project with 61 units was completed on time:

(i) the 14 units completed in September 2010

(ii) the 36 units completed in February 2011

(iii) the 11 units completed in March 2011

[9] The defendant contended that they completed the construction works based on the terms and conditions stipulated in the letter of award. Even though the construction of the houses has been duly completed by the defendant, there is an amount still outstanding in the sum of RM90,583.43 and 5% of the retention sum of RM341,971.54. Both outstanding sums have been certified by Arkitek Saujana. The defendant's counterclaim against the plaintiff is for the sum of RM432,554.97.

The High Court's Findings

[10] At the High Court, several issues were raised and considered by the learned trial judge. The main issue however, before the court, was whether the defendant had complied with the plaintiff's drawings specifying that the living room and/or saloon area must be 40sqf in length. The failure by the defendant to comply would have been a breach of the contract. The learned judge concluded based on the evidence before him that the defendant failed to comply with the revised architectural drawings.

[11] As a result of the breach by the defendant in constructing the 61 units of houses with 38sqf length instead of 40sqf length, the plaintiff had indeed suffered losses as it had to sell the houses with a discount or reduction of RM20,000 for each house.

Our Decision

Principles of Appellate Intervention

[12] An appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence. Justice Raus Sharif (President of the Court of Appeal as His Lordship then was) elucidated that the appellate court will intervene in a case where the trial court had so

fundamentally misdirected itself (See: *Merita Merchant Bank Singapore Ltd v. Dewan Bahasa dan Pustaka* [2014] 9 CLJ 1064). The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Pte Ltd* [2010] 9 CLJ 785 where it was held at p. 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (see *Chow Yee Way & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[13] The Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence. The Federal Court further stated that a court hearing the appeal is entitled to reverse the decision of the trial judge after making its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case. It is also entitled to examine the process of evaluation of the evidence by the trial court and reverse a decision if it is wrong.

[14] However, the appellate court must be slow to interfere with the findings made by the trial court unless if it be shown there was no judicial appreciation of the evidence adduced before it.

[15] The failure to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will require the appellate courts to take on the role of first instance judge and review the evidence in its entirety afresh.

[16] Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

The Alleged Discrepancy

[17] It is not disputed that the defendant completed the project within the time as stipulated in the contract. There was no delay in the completion of the project and no liquidated and ascertained damages was imposed. The thrust of the argument of the learned counsel for the plaintiff was that the 61 units of houses constructed by the defendant had a discrepancy of 2sqf. The alleged discrepancy was discovered by the plaintiff's director sometime in early 2011 but he disclosed the discovery of the purported discrepancy two years after the defective liability period. It is the plaintiff's contention that the construction drawings with the purported length of the houses to be built was 40sqf in the living and/or the saloon area were given to the defendant. The defendant contended that the construction drawings that were given to them stated that the length of the living and/or the saloon area to be built was specified at 38sqf.

[18] The building plan for the phase 2 works dated September 2005 was approved by the Majlis Perbandaran Nilai (MPN) on 7 September 2006. The building plan for phases 2 & 3 dated December 2011 was approved by MPN on 30 January 2012. The original plans provided by the defendant corresponded with the architectural plans as set out in the quotation dated 6 March 2010. In all the plans approved, the ground floor plan showed the length of the terrace house as being 38sqf.

[19] Learned counsel for the defendant submitted that there were no contemporaneous documents adduced as evidence by the plaintiff to show that the drawings requiring the length of the living or saloon area to be 40sqf in length were handed over to the defendant.

[20] The building plan for phase 2 of the project was approved by the MPN on 7 September 2006. The building plan for part of phase 2 and 3 was approved on 30 January 2012. The defendant contended that they were given the architectural plans identified and stamped as "construction drawings". All the plans specified that the length of the living/saloon area is 38sqf. The original copies of the plans were tendered by the defendant and corresponded with the architectural plans as set out in the quotation dated 6 March 2010.

[21] The plaintiff tendered the revised architectural drawings dated December 2009 specifying that the length of the living/saloon area is 40sqf.

[22] The certificate of fitness ("CF") for phase 2 was issued by MPN on 31 January 2012. The defective liability period expired on 30 January 2014. DW1 (Sharizal bin Yeop, MPN's Penolong Pegawai Senibina) visited the project site on 7 February 2011 and found a discrepancy in the windows of the units and directed by letter dated 30 January 2012 the architect to submit

a revised building plan in respect to the amendment to the windows of the houses. It was contended by the defendant that they were only notified by the plaintiff of the alleged discrepancy through a letter dated 13 October 2014.

[23] Learned counsel for the defendant argued that the plaintiff could not have developed nor constructed phase 2 of the project without the approval of the plans by MPN. Learned counsel for the plaintiff, however, in response submitted that the defendant did not comply with the "architectural building plan" dated 30 January 2012 ("D27") where the specification of the floor length is 40sqf which was approved by MPN.

[24] We observed that the learned judge had concluded that the failure to comply with the requirements of the Uniform Building By-Laws 1984 ("the UBBL") will only result in the local authority, in this case MPN not granting the CF:

> 56. Isu dalam kes ini ialah berkenaan dengan kontrak antara pihak-pihak. Defendan telah memungkiri surat tawaran kontrak untuk membina rumah-rumah berukuran 40 kaki persegi. Perkara ketakpatuhan mengikut peruntukan dalam Akta 133 tersebut bukan masalah Defendan. Walaupun Defendan berhujah bahawa mereka membina rumah-rumah berukuran 38 kaki persegi mengikut pelan dalam "D30" yang diluluskan oleh MPN pada 7.9.2006 ('D26' M/s 116 Ikatan Dokumen D), namun pada pandangan saya, tindakan Defendan itu masih tidak mengikut terma-terma dalam surat tawaran yang menghendaki membina rumah mengikut ukuran 40 kaki persegi berdasarkan harga kontrak yang telah dipersetujui.

[25] We had considered very carefully the submissions of learned counsel, the appeal records and the learned High Court Judge's judgment and we were unable, with respect, to agree with the learned High Court's decision. Having carefully read the judgment of the learned judge, we are satisfied that there are merits in the complaints raised by the appellant before us. It appears that the learned judge misappreciated the facts. The issue that was for determination was whether the defendant had breached the terms of the letter of award for failing to construct the houses according to specification in the contract, in particular in respect to the length of houses. However, in determining whether the defendant had breached the terms of contract, the learned judge must take into consideration whether the revised architectural plan was approved by the MPN and that the said approved revised architectural plan was given to the defendant to comply. The defendant must construct the houses based on the plan approved by MPN.

[26] The learned trial judge had fundamentally misdirected himself when he concluded that the approved plans by MPN are only for the purpose of the issuance of the CF. The learned judge was of the opinion that constructing the houses based on approved plans by MPN was not the determinative

factor whether the defendant had breached the contract by failing to construct the houses with the length of 40sqf as stipulated in the revised construction drawings.

[27] We had perused the contract documents and we found no clause specifically providing that the length of the houses to be built must be 40sqf. Item 6.0 of the letters of award (dated 2 April 2010 and 28 October 2010) merely stipulates that "The works shall be constructed and completed in accordance to the construction drawings, details and specifications. The scope shall include all specification as described in the contract documents". The defendant constructed the houses based on the construction drawings given to them where it was specified that the length of the houses to be built was 38sqf. There were two plans approved by the MPN:

(i) the building plan for phase 2 dated September 2005; and

(ii) the building plan phase 2 and 3 dated December 2011.

[28] Five architectural plans were given to the defendant as construction drawings. The plan dated February 2010 and identified as 'construction drawings' ("D30") shows the length of the houses to be 38sqf. The engineering drawings dated December 2009 marked as exh. D45 shows the length of the living/saloon area of the house to be 38sqf and not 40sqf.

[29] Section 70 of the Street, Drainage and Building Act 1974 provides:

> (1) No person shall erect any building without the prior written permission of the local authority.
>
> (2) Any person who intends to erect any building shall cause to be submitted by a principal submitting person or submitting person-
>
> (a) to the local authority such plans and specifications as may be required by any by-law made under this Act; and
>
> (b) to the relevant statutory authority such plans and specifications as may be required by any other written law.

[30] The plaintiff failed to produce any of the plans which they had relied on except for the revised architectural drawing dated December 2009 and revised structural drawing dated November 2009. However, there were no supporting evidence, oral or documentary to prove that the two drawings were actually given to the defendant or approved by the MPN according to the requirement of the law.

[31] Upon perusal of the notes of evidence, we found that the defendant's witness DW1 testified that D27 did not amend the length of the living/saloon area but the amendments as ordered by the MPN was in respect of the windows of the units as indicated by the dotted red/blue lines on the

plan. He also confirmed that the length of the houses remained at 38sqf based on the previous approved plan dated 7 September 2006 ("D26") as MPN does not have any record of any amendment to the length of the house made by the plaintiff as alleged. DW1 further explained that any plans submitted for additions or alteration must comply with r. 14 of the UBBL.

[32] DW1 testified that he had visited the project site on 7 December 2011 and found a discrepancy in respect of the windows of the houses and issued the necessary instruction to the architect. DW1 confirmed that with regards to the length of the floor there was no amendment as there were no dotted red/blue lines on the plan. There were no records of any amendment to the length of the house:

> 39. Q: Adakah dalam pelan ini terdapat perubahan dari segi dimensi kepanjangan?
>
> A: Jika saya rujuk kepada pelan tiada yang rekod Majlis Perbandaran Nilai, tiada pindaan yang melibatkan dimensi yang dinyatakan di sini kerana tidak menyatakan garisan putus-putus warna biru dan garisan baru warna merah.

(See: p. 485; notes of evidence; rekod rayuan jld 2(2) bahagian B)

[33] He further confirmed that any construction works on site must comply with the plans as approved by the MPN:

> Sebarang pembinaan yang dijalankan ditapak perlulah mengikut kepada pelan yang diluluskan oleh Majlis Perbandaran Nilai.

(See: Q. 40 p. 485; notes of evidence; rekod rayuan jld 2 (2) bahagian B)

[34] The plaintiff's own witness SP3, the director of the company testified that he had discovered the discrepancy by using a tape measurement before February 2011 but chose to remain silent for two years after the full completion of the construction. He explained that it was his strategy not to disclose that fact for two years until after the defective liability period is over in order to ensure that the defendant will complete the construction and not leave during the maintenance period:

> 47. Q: When did you discover this?
>
> A: I repeat when it's completed. When the structures was completed.
>
> ...
>
> 50. Q: When you discover it?
>
> A: Just before handover
>
> 51. Q: When did you handover the property?
>
> A: February 2011

54. Q: When you discovered the irregular works, did you notify the contractor? A

A: No

...

69. Q: So, you did not give them any notification in regards to discrepancy, right B

A: No

70. Q: Why didn't you give them the notification?

A: Because it was two years' maintenance period. If I told them about this discrepancy, to the high chance they may have left the job, not follow the full contract obligation. So, I decided to wait until the period was up and taking all the defects, then I will inform them. C

(See: pp. 413-417; notes of evidence; rekod rayuan jld 2(2) bahagian B). D

[35] We find it rather strange that the plaintiff, an experienced developer, would keep such a discovery of a discrepancy for two years and wait until the full completion of the construction of the houses before raising non-compliance to architectural plans. The discrepancy with regards to the floor length was only made known by the plaintiff to the defendant on 13 October 2014 after the defendant through their solicitors issued a notice of demand dated 29 August 2014 for the sum of RM432,554.97 for retention sum due and for outstanding sum due for infrastructure works done. E

[36] Apart from the testimony of SP3, there were no evidence adduced by the plaintiff that the defendant constructed the houses in breach of the approved plans. Throughout the construction period there was no evidence of non-compliance or delay by the defendant. In fact, the architect appointed by the plaintiff certified and approved all the works that were completed by the defendant. If at all the defendant had constructed the living/saloon area not in accordance with the plans, the architect would have not certified that all works were duly constructed. F G

[37] The architect himself had admitted that the revised architectural drawings dated 30 January 2012 were only submitted to MPN after the construction of the 61 units were completed:

113 Q: In this particular case, did you submit the revised architectural drawings to MPN? H

A: Yes

114 Q: Is it before construction or during construction or after the construction has been completely done? I

A: After

(See: p. 325; notes of evidence; rekod rayuan jld 2(2) bahagian B).

[38] The CF that was issued by MPN specifically stated that it was based on the approved building plan dated 7 September 2006. The CF issued meant that the construction of the 61 unit of houses was in accordance with the approved building plan.

[39] The learned High Court Judge had failed to consider that the plaintiff only submitted the revised plan after the completion of the construction of the houses and the CF was issued based on the approved plan dated 7 September 2006. In our view, the learned trial judge had failed to give due consideration of material evidence to conclude that the defendant had breached the contract.

Conclusion

[40] Having considered the decision of the learned High Court Judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we were of the respectful view that there was an appealable error that had been shown by the appellant that could properly justify an appellate intervention. We found that the findings of the High Court Judge were against the weight of all the evidence that was before him.

[41] For the reasons we discussed above, we were constrained to hold that the learned judge had failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny, it merited our appellate intervention.

[42] Hence, we had unanimously allowed the appeal with costs of RM50,000 for here and below. We also had allowed the counterclaim by the defendant for the retention sum of RM341,971.54 and RM90,583.43 for works done as well as costs of RM10,000. All costs subject to the payment of allocator. We set aside the order of the High Court.